No. 85-1248

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

ODESSIE MALONE - - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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January ____, 1986

WESTERFIELD-BONTE CO., 619 W. KENTUCKY-P.O. BOX 3251, LOUISVILLE, KY.

QUESTION PRESENTED

In a case involving the purchase of drugs by an undercover police officer where an informant was present at the time of the sale, does the due process clause of the Fourteenth Amendment require the disclosure of the informant's identification and location where the petitioner's theory of the defense is mistaken identification?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No.

ODESSIE MALONE - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The petitioner, Odessie Malone, prays that a writ of certiorari issue to review the Opinion of the Supreme Court of Kentucky entered in this proceeding on November 21, 1985.

OPINION BELOW

The opinion affirming the petitioner's conviction and sentence in the Jefferson Circuit Court, Louisville, Kentucky, was rendered by the Kentucky Supreme Court on November 21, 1985. A Petition for Rehearing was not filed in the petitioner's case. A copy of the above-mentioned opinion is attached hereto.

JURISDICTION

The opinion of the Kentucky Supreme Court was entered on November 21, 1985. This petition is filed within sixty (60) days of that date. The jurisdiction

of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Fourteenth Amendment to the United States Constitution which states, in pertinent part:

> . . . nor shall any State deprive any person of liberty . . . without due process of law . . .

STATEMENT OF THE CASE

Dawn Fleets is a Detective in the Jefferson County Police Department and was involved in 1983 and 1984 in a sting operation involving drug trafficking in Jefferson County, Kentucky (Transcript of Evidence, hereinafter designated T.E., p. 5) Fleets testified that on October 3, 1983, she went to 402 Shasta Trail where she met petitioner's co-defendant, Christopher Malone, and asked to purchase a fifty cent (50¢) piece of heroin (T.E., p. 6). The witness stated that Christopher Malone told her that he could only sell one gram for $100.00 and she agreed to this amount. (T.E., p. 7) When asked by the prosecution who was with her at that time, Detective Fleets said that "It was just me and him standing outside." (T.E., p. 6)

Detective Fleets testified that Christopher Malone left in his automobile for about fifteen (15) minutes and returned, asked her for the $100.00 and told her that the "stuff was on its way." (T.E., p. 8)

The witness stated that while she and Christopher were talking a two-toned Cadillac pulled up behind Chris' car. Chris then walked to the Cadillac and an individual got out of the car. Chris gave the person the money, and the person handed Chris a package. (T.E., pp. 8 & 9)

Detective Fleets testified that this transaction took place around fifty (50) feet from where she was standing. (T.E., p. 9)

She said that then Chris returned to her and handed her the package. (T.E., p. 9) The only words passed between the individual and Detective Fleets was the individual asking how she was. (T.E., p. 10) Detective Fleets identified both Christopher Malone and petitioner, Odessie Malone, as the parties to this transaction. (T.E., pp. 10 & 11)

Detective Fleets was again asked by the prosecution if there were others present during this transaction. She testified that there were family members in the yard and that she had ". . . a subject with me and he was up in the yard with the family . . ." (T.E., p. 12) She testified that during the actual transaction only Chris was present with petitioner standing back. (T.E., p. 12)

Detective Fleets testified that she then left the area and went downtown and filled out the "buy report".

The drugs purchased were eventually delivered to the State Police Crime Lab in Jefferson County for analysis where it was found to be .93 grams of heroin. (T.E., p. 74)

During cross examination, Detective Fleets stated that when she drove to the above stated address that a man named James Nevells was with her (T.E., p. 12) The witness admitted that Nevells was a confidential informant (T.E., p. 23), and that she used him to be with her "when needed in investigations." (T.E., p. 24)

Detective Fleets testified that Nevells could have seen Chris leave and come back and that he could have seen the petitioner drive up. (T.E., pp. 26 & 27) When asked if Nevells could have seen the petitioner hand something to Chris she said that she didn't know. (T.E., p. 27) She stated that she "didn't ask him." (T.E., p. 26) Detective Fleets did not know where Nevells was on the day of the trial. (T.E., p. 27)

Detective Fleets testified that during this operation that she met hundreds of people, that 159 were arrested as a result of her work and that a majority of those were black. (T.E., pp. 31-32) Fleets stated that this was her first undercover assignment, that she had no training for the job and that she was not wired on the day of the sale. (T.E., p. 32)

Later in cross examination, Detective Fleets stated that a second person arrived with her the day of the alleged buy, one Charles Shoulders, a cousin of the petitioner. (T.E., p. 36) Fleets admitted that there were eight (8) Malone brothers and that she did not know what they looked like. (T.E., p. 30)

The Commonwealth closed its case and attorney for petition moved for a directed verdict on the ground

that petitioner had requested prior to trial, and the Court had directed the Commonwealth to provide the name of any other individuals, including informants, who were present at the time and place of the alleged transaction. In its pre-trial order, the Court ordered in part that:

> The Commonwealth shall furnish the defendant with a Bill of Particulars, which advises the defendant with specificity the circumstances of the alleged offense(s). Included in the Bill of Particulars whether the defendant, Odessie Malone, is alleged to have had actual possession of any controlled substances on the date and time alleged in the Complaint. State whether any other individuals were present at the time and place alleged in the indictment. State whether any individuals known by the police to be present were part of the alleged drug transfer or were aware of the transfer. State whether the Commonwealth relied on any informant, confidential or otherwise, for information leading to the arrest of the defendant, Odessie Malone, on the charges *sub judice*.
> (Appendix, p. 5a)

The Commonwealth's response to this particular request was:

> On October 3, 1983, at approximately 5:00 p.m., Detective Dawn Fleets of the Jefferson County Police Department, met Christopher Malone at 4402 Shasta Trail to purchase some heroin. Detective Fleets gave Christopher Malone one hundred dollars ($100.00) cash in her car at the above address for one (1) gram of heroin, and Christo-

> pher proceeded to another vehicle at which time Odessie Malone exited. Christopher gave Odessie the one hundred dollars ($100.00), and Odessie handed Christopher a small package. Both defendants then approached the officer's car at which time Christopher gave her approximately one (1) gram of heroin. (Appendix, pp. 7a-8a)

The Commonwealth's reply was that only person's present were the petitioner, Christopher Malone, and Fleets. (see Order and Response—Appendix, pp. 8-9).

In overruling petitioner's motion, the trial court stated that the missing witness must be a critical witness and that Nevells "apparently didn't even see it from the testimony." "If the person did see it, the Commonwealth would have that person in here to help establish the guilt." (T.E., pp. 78-79)

The following discussion took place:

> The Court: And she said that this person was up in the yard and didn't see anything.
>
> Mr. Landrum: As not what she said on the Cross, Judge. I said, "Could he have seen it?" And she said, "Yes."
>
> The Court: She said yes if he had been looking.
>
> Mr. Landrum: She didn't say he wasn't looking the whole time, and the point of it is.
>
> The Court: I took it to mean that somebody has explored this and talked to the person and they didn't know anything about it, so they didn't call him as a witness.

Mr. Landrum: I asked her that specific question, Judge, and she said, "No, she didn't ask him."

The Court: Well, but I mean by some method, she had determined that this person didn't see it, that's the testimony. Isn't that the way you understand it.

Mr. Carby: That's the way I understood it Judge. That he was up in the yard with a group of other people.

The Court: You said, "Could he have seen it?" And she said, "Yes.", if I understood her correctly, "Yes he could have seen it if he'd been looking", or something to that effect. But I took that to mean no he wasn't looking. He didn't see it.

Mr. Landrum: I said, "Did you ask him?" And she said, "No".

The Court: No, but I mean I took it to mean that she had determined somehow, otherwise I mean . . .

The trial judge then stated that anyway Nevells was not a confidential informant at this time because Fleets said his name during the trial. (T.E., pp. 83 & 84)

The first witness for the defense was co-defendant Christopher Malone. Chris testified that he had never met Detective Fleets but that he had seen her outside his brother Darryl's house next door 3 or 4 times. (T.E., pp. 92-93). Chris stated that he never talked with Det. Fleets or sold her any narcotics.

Chris admitted in cross examination that on May 31, 1984 that he pleaded guilty to selling cocaine to Detective Fleets on October 14, 1983 but stated that

the reason he pleaded guilty was ". . . due to the evidence because I didn't have no witnesses. I didn't have no defense to fight." (T.E., p. 101)

The prosecution had Chris read part of his guilty plea to the jury and played a recorded tape of the plea. (T.E., pp. 102-119). Petitioner's Motion for Mistrial was overruled. (T.E., p. 111)

Terry Green testified for the petitioner and stated that she was a friend of Priscilla Morton, the petitioner's sister, and that on October 3, at around 5:00 that petitioner came by her apartment and requested a ride to the Jefferson County Hall of Justice because of a 7:00 Traffic Court appearance. (T.E., pp. 135-138) Ms. Green stated that she got off work at 4:15 every day and got home around 4:45. (T.E., p. 137). She said that she remembered the date because it was her brother's birthday and that when petitioner came to the door she was talking with her brother on the phone. (T.E., p. 136) She testified that she took him to the Courthouse around one (1) hour later. (T.E., p. 138)

Petitioner testified that he may have seen Detective Fleets at his parents' house because on October 29, 1983, his cousin Charles Shoulders and the informant Nevells came to the Malone residence and there was women in the car. (T.E., p. 149) Charles Shoulders told him that Nevells had something that he might be interested in but petitioner stated that he wanted nothing they had. (T.E., p. 148) Petitioner said that he never spoke with the women sitting in the automobile and could not be sure if it was Fleets or not. (T.E., p. 149)

After speaking with Charles Shoulders the petitioner went into his parents' house. (T.E., p. 152)

Petitioner testified that he had two (2) brothers who owned two-toned blue cars but that he never had one that color. (T.E., p. 149).

A receipt showing that an electric eel was rented by Darryl Malone on October 29, 1983 introduced into evidence. (T.E., pp. 121-122) Detective Fleets had stated that the day she was there that Darryl Malone's yard was dug up with a number of individuals working. (T.E., p. 135)

Petitioner testified that on October 3rd that he had a 7:00 p.m. Traffic Court appearance and that he went to Terry Green's house well after 4:00 so that she could give him a lift. (T.E., p. 155) A docket sheet from Jefferson District Court was introduced into evidence showing that petitioner was to be in night Traffic Court on the charge of operating with a suspended license and that the charges were dismissed because petitioner had a valid driver's license. (T.E., p. 172)

Petitioner made motion for Directed Verdict at the close of the case, and the Court overruled this motion. (T.E., p. 193)

Petitioner was found guilty of trafficking in a controlled substance and the jury fixed his punishment at confinement in the penitentiary for twenty (20) years and a fine of $20,000.

On August 6, 1984, a Judgment of Conviction was entered by the Court sentencing petitioner to twenty (20) years in the penitentiary and a $20,000.00 fine.

REASON FOR GRANTING THE WRIT

The Decision of The Supreme Court of Kentucky That the Identity of the Informant Did Not Have To Be Revealed Prior to Trial is in Conflict with This Court's Decision in *Roviaro* v. *United States*, 353 U. S. 53 (1957), and Decisions of Various Federal Circuits.

The record in the petitioner's case clearly reveals the following undisputed facts:

(1) In an Order entered on May 17, 1984, the trial judge specifically directed the Commonwealth to provide the defendant with the names of any individuals who "were present at the time and place alleged in the indictment," and, in addition, "whether the Commonwealth relied on any informant, confidential or otherwise, for information leading to the arrest of the petitioner, Odessie Malone, on the charge *sub judice*." (See Appendix, pp. 4a-6a)

(2) In a Response filed by the Commonwealth on June 19, 1984, the Assistant Commonwealth's Attorney specifically stated that the only individuals present at the time of the alleged sale of the drug were Detective Fleets, the petitioner, and the petitioner's co-defendant Christopher Malone. (See Appendix, pp. 7a-8a)

(3) It was only during the cross-examination of Dawn Fleets, the undercover police officer, at the trial on July 11, 1984, that the existence of the confidential informant was revealed. Even though Detective Fleets revealed the name of the individual, she did not know where the person was located at the time of the trial.

(4) Subsequent cross-examination of Detective Fleets revealed that the confidential informant was

present at the time and place of the alleged purchase of the heroin. According to the detective, the confidential informant was in location where he could have seen the transaction itself. With the petitioner later raising the question of identification as a defense, the record clearly reveals that the testimony and identification made by Detective Fleets was the only evidence linking the petitioner to the alleged crime.

Relying on this Court's decision in *Roviaro* v. *United States,* 353 U. S. 53 (1957), the petitioner in his pleadings before the Supreme Court of Kentucky raised the issue of the Commonwealth's failure to reveal even the existence of a confidential informer prior to trial. In the Opinion rendered on November 21, 1985, the Supreme Court of Kentucky recognized the vitality of this Court's decision in *Roviaro* and that it had been adopted in Kentucky in the decision in *Burks* v. *Commonwealth,* Ky., 471 S. W. 2d 298 (1971). However, without any detailed analysis or reasoning, the Supreme Court of Kentucky concluded that the Commonwealth's failure to disclose the existence of the informant did not prejudice or deny the petitioner a fair trial. (See Appendix, pp. 1a-3a)

The petitioner submits that the decision of the Supreme Court of Kentucky is in direct conflict with the due process doctrine articulated by this Court in *Roviaro* v. *United States, supra.* In that case, the Goverment had been allowed to withhold the identity of a confidential informer who had made the drug purchase through which the defendant, as the seller, was convicted. Recognizing the important interest in

effective law enforcement which are served by the Government's privilege to refuse to disclose the identity of those who report violations of law to appropriate officials, this Court found a limitation on the privilege in the requirements of fundamental fairness. This Court held:

> Where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure, and, if the Government withholds the information, dismiss the action. *Id.*, at 60-61.

This Court in *Roviaro* declined to establish a fixed rule that disclosure would be required whenever it was demanded. Instead, this Court stated that the problem calls for a balancing of the interest of the public in maintaining the secrecy of an informer against the individual's right to present a defense. This Court stated:

> Whether a proper balance renders non-disclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. *Id.*, at 62.

The charge placed against the petitioner was one involving illegal trafficking in heroin. The petitioner was allegedly the supplier of the heroin, Christopher

Malone was the middleman, and the undercover police officer was the purchaser. With the petitioner denying any involvement in the transaction at trial, the question of identification became an issue in the case. Detective Fleets, the undercover officer, testified that the supplier of the heroin was the petitioner. The petitioner denied any knowledge of the sale of heroin. According to the detective during cross-examination, the informant was present at the time and place of the alleged sale, and furthermore was in a position where he could have seen the actual transaction. Consequently, the informer's possible testimony at trial was significant as to the issue of identification of the defendant.

Under facts and circumstances nearly on all fours with the petitioner's case, various federal circuits have concluded that the due process doctrine of *Roviaro* mandate the disclosure prior to trial of the identification and location of the informant. In the *United States* v. *Silva*, 580 F. 2d 144 (5th Cir. 1978), the court examined a situation where the appellant Silva had been convicted on two counts involving the sale of cocaine to an undercover agent of the Drug Enforcement Administration. The negotiations for the sale occurred in an automobile driven by an informant in which only the appellant and the undercover officer were present. At the time of the actual transaction, the informant was outside the car near the front while the agent and the appellant remained inside. At trial, the appellant defended on the grounds of mistaken identity. *Id.*, at p. 146.

In his appeal, the appellant Silva raised the question of the trial court's failure to require the Government to disclose the identity of the confidential informant. In reversing Silva's conviction, the Fifth Circuit stated:

> Two of the three factors noted by *Roviaro;* "the possible defenses [and] the possible significance of the informer's testimony," here weigh heavily in favor of disclosure. The appellant asserted only one defense, that of mistaken identity. Therefore, allegedly having no knowledge of the transaction itself, the appellant needed the absent informant in order to refute the undercover DEA agent's testimony . . . In applying the *Roviaro* balancing test to the instant case we conclude that the trial court improperly denied appellant access to the informant's identity. *Id.*, at 147.

Similarly, in *United States* v. *Ayala,* 643 F. 2d 244 (5th Cir., Unit A 1981); the court examined a situation where an undercover police officer, an unidentified female informant, and a co-defendant named Lopez made arrangements for the purchase of heroin. The heroin was to be brought into a park area by a jogger. Lopez, the informant, and the DEA agent arrived at the park when a jogger approached Lopez and handed Lopez a package. This package later turned out to contain heroin. Lopez was apprehended at the scene, however, the jogger was not found. The Government later charged the appellant Ayala with being the jogger and the source of the heroin. Prior to trial, counsel for Ayala moved to compel the Government to disclose the

identity of the informant. The trial court, after conducting an *in camera* hearing, overruled the motion. In examining the necessity of disclosure to the appellant Ayala, the Fifth Circuit concluded:

> We have required more than conjecture or supposition about the importance of the informer's testimony. A close relationship between the asserted defense and the informer's likely testimony favors disclosure . . . Ayala has made a specific concerning the necessity of the informer's testimony to his defense. His primary defense was that he was not the jogger who met Lopez in the playground and was not involved in a conspiracy . . .
>
> Ayala contends that the testimony of the informer, who allegedly had a closer view of the jogger than the agent, would be directly relevant to proving that he was not the jogger and cast doubt on the agent's identification. Ayala's contention therefore, rises above a pure conjecture. He has made a sufficiently specific demonstration of the relevancy and potential helpfulness of the informer's testimony. *Id.*, at 247.

See also: United States v. *Tucker*, 552 F. 2d 202 (7th Cir. 1977), where the court required the disclosure of an informant who was present at the time of the sale of drugs to an undercover officer under circumstance where the defendant claimed he was not involved in the transaction.

The petitioner in the case at bar claimed that he was not involved in the illegal drug transaction in any way. Consequently, the question of identification becomes

one of major import in the trial in the Jefferson Circuit Court. Where the only evidence to link the petitioner to the alleged crime is that of the undercover agent, the testimony of another witness to the transaction, the confidential informant, becomes relevant as to the issue of identification. The principles espoused by this Court in *Roviaro* mandated the disclosure prior to trial of the existence and identification of this informant.

This important constitutional question in the administration of criminal justice justifies the grant of certiorari to review the decision below.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the opinion of the Supreme Court of Kentucky entered on November 21, 1985.

Respectfully submitted,

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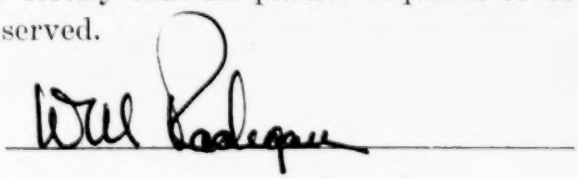
CERTIFICATE OF SERVICE

I, William M. Radigan, counsel for petitioner, hereby certify that forty (40) copies of the foregoing Writ of Certiorari was mailed to the Office of the Clerk of the United States Supreme Court, Washington, D.C. 20543, and three (3) copies to the Hon. David L. Armstrong, Attorney General, Capitol Building, Frankfort, Kentucky 40601, on this 21st day of January, 1986, by personally depositing the same in the United States mailbox, First Class postage prepaid. I further certify that all parties required to be served have been served.



APPENDIX

RENDERED: NOVEMBER 21, 1985
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

84-SC-1176-MR

ODESSIE MALONE - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From Jefferson Circuit Court
Hon. Richard Revell, Judge
No. 84-CR-0482

MEMORANDUM OPINION OF THE COURT AFFIRMING

This appeal is from a judgment based on a jury verdict which convicted Odessie Malone of trafficking in a controlled substance, subsequent offender, and sentenced him to twenty years in prison and a $20,000 fine.

The issues presented are whether the failure of the Commonwealth to list the name of an informant present at the scene of the arrest was reversible error and whether the proceedings were so affected by surprise and prejudice that the interests of justice require a new trial.

This Court affirms the conviction.

Odessie Malone argues that the prosecution should have disclosed the identity of a confidential informant because he accompanied Detective Fleets to the scene of the drug buy and was in a position to have observed the alleged sale and was aware of the purpose of the trip to the defendant's

home. The accused filed a bill of particulars to obtain such disclosure. There is no indication from the record that the informant was a witness to the transaction.

Detective Fleets testified that the informant was in the yard with the members of the Malone family when she made the drug buy from Odessie Malone. The informant did not participate in the sale. It is entirely speculative as to whether his testimony could have been relevant and helpful to the defense.

Where the disclosure of an informer's identity is relevant and helpful to the defense of the accused or is essential to a fair determination of the case, the privilege must give way. *Roviaro* v. *United States*, 353 U. S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957). The problem requires a balancing of the public interest in protecting the flow of information from informants against an individual's right to prepare his defense. The particular circumstances of each case are the determining factors. Kentucky has adopted the holding and rationale of *Roviaro, supra,* in *Burks* v. *Commonwealth*, Ky., 471 S. W. 2d 298 (1971). Odessie Malone was not prejudiced or denied a fair trial because the prosecution did not disclose prior to trial the identity of a nonparticipating confidential informant.

Detective Fleets was the only witness presented by the prosecution and it is argued that she relied on her notes and some of her testimony was inconsistent. Her memory regarding the events around the offense, reliance on her notes and credibility were matters for the jury to consider in weighing her testimony. The confidential informant did not sell the drugs to the defendant and it is highly speculative as to whether he witnessed the drug sale at all. Testimony of the most adverse nature would not have caused the result in this case to have been any different. Considering the case as a whole, there is no substantial possibility that

the result would have been any different. *See Commonwealth* v. *McIntosh,* Ky., 646 S. W. 2d 43 (1983).

The contentions of Odessie Malone as to surprise at trial are without merit. Christopher Malone testified in his own defense. Darryl Malone testified on behalf of Odessie and Christopher Malone and stated that he had not been convicted of a felony. However, on cross-examination he changed his testimony and admitted to being a convicted felon as of June 29, 1984. The impeaching of Christopher and Darryl Malone by use of prior convictions was proper and the admonition given by the trial judge cured any possible prejudice that Odessie Malone might have suffered. *See Commonwealth* v. *Richardson,* Ky., 674 S. W. 2d 515 (1984).

The judgment is affirmed.

All concur.

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JEFFERSON CIRCUIT COURT

DIVISION FOUR

No. 84CR-0482

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

ODESSIE MALONE - - - - - - *Defendant*

ORDER—Entered May 17, 1984

The above styled action having been assigned to a conference and the Court being sufficiently advised:

IT IS ORDERED that:

1. The Commonwealth permit the defendant to inspect and copy or photograph any relevant (a) written or recorded statements or confessions made by the defendant, or copies thereof, that are known by the attorney for the Commonwealth and (b) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with this case, or copies thereof, that are known by the attorney for the Commonwealth to be in possession, custody or control of the Commonwealth.

2. The Commonwealth permit the defendant to inspect and copy or photograph books, papers, documents or tangible objects or copies, or portions that are in the possession, custody or control of the Commonwealth and which are material to the preparation of his defense. If there is a dispute as to the materiality of such items or as to the reasonableness of the defendant's request, this matter shall be brought to the attention of the Court at least forty-eight

(48) hours prior to the scheduled event-trial, conference or other.

3. Reciprocally, the defendant shall permit the Commonwealth to inspect, copy or photograph statements, scientific or medical reports, books, papers, documents or tangible objects which the defendant intends to produce at the trial and are in his possession, custody or control.

4. This provision does not authorize pretrial discovery or inspection of reports, memoranda, or other documents made by officers and agents of the Commonwealth in connection with the investigation or prosecution of the case, or of statement made to them by witnesses or prospective witnesses (other than the defendant), unless such reports, memoranda or other documents are clearly supportive of the defendant's claim of innocence.

5. The Comonwealth shall furnish the defendant with a Bill of Particulars, which advises the defendant with specificity the circumstances of the alleged offense(s). Include in the Bill of Particulars whether the defendant, Odessie Malone, is alleged to have had actual possession of any controlled substances on the date and time alleged in the Complaint. State whether any other individuals were present at the time and place alleged in the indictment. State whether any individuals known by the police to be present were part of the alleged drug transfer or were aware of the transfer. State whether the Commonwealth relied on any informant, confidential or otherwise, for information leading to the arrest of the defendant, Odessie Malone, on the charges *sub judice*.

6. Upon request for and arrangement as to expense by the defendant, the Commonwealth shall deliver any mechanical recording, or a duplicate tape, of the grand jury proceedings relating to the defendant's indictment.

7. If the Commonwealth or defendant foresees the necessity of any pretrial hearings, including but not limited

to (a) severance of counts or defendants (b) suppression of evidence or statements (c) challenge of arrest or identification, motion for such hearing must be made at the conference of the case and in no event later than fifteen (15) days before the trial date.

8. The relief granted by this Order shall be permitted by the respective parties three (3) days prior to the conference date, or at such other time and place by written stipulation. Any objections to all or part of this Order shall be made in writing at least five (5) days prior to the scheduled event.

9. Failure to comply with the terms of this Order may subject the defaulting party to the penalties prescribed in 7.24, Kentucky Rules of Criminal Procedue.

(s) Richard S. Revell
Judge

Date 5-17-84

Copy Received/Commonwealth_____

Copy Received/Defendant_____

JEFFERSON CIRCUIT COURT

FOURTH DIVISION

No. 84CR0482

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

ODESSIE MALONE - - - - - - *Defendant*

RESPONSE

Comes the Commonwealth of Kentucky, by Counsel, David W. Carby, Assistant Commonwealth's Attorney for the 30th Judicial District of Kentucky, and for its Response to Defendant's Motion states as follows:

1. Attached are copies of the "buy letter" and lab report.

2. See Response No. 1.

3. See Response No. 1.

4. See Response No. 1.

5. On October 3, 1983, at approximately 5:00 p.m., Det. Dawn Fleets of the Jefferson County Police Department, met Christopher Malone at 4402 Shasta Trail to purchase some heroin. Det. Fleets gave Christopher Malone one hundred dollars ($100) cash in her car at the above address for one (1) gram of heroin, and Christopher proceeded to another vehicle at which time Odessie Malone exited. Christopher gave Odessie the one hundred dollars ($100), and Odessie handed Christopher a small package. Both defendants then approached the officer's car at which time Christopher gave her approximately one (1) gram of heroin.

Respectfully submitted,

PAUL W. RICHWALSKY, JR.
Commonwealth's Attorney

(s) By David W. Carby
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This is to certify that a copy of the foregoing was hand-delivered to Mr. Dan Landrum, Attorney at Law and to Mr. John Rankin, Attorney at Law, this 19th day of June, 1984.

(s) David W. Carby
Assistant Commonwealth's Attorney